No. 90-976

In The

Supreme Court of the United States

October Term, 1990

ANCLOTE MANOR HOSPITAL, INC.; WALTER H. WELLBORN, JR., M.D.; ARTHUR R. LAUTZ; MANUEL VALLES, JR.; ROBERT L. CROMWELL; THOMAS C. FARRINGTON, JR.; THOMAS E. McLEAN; JAMES C. TREZEVANT, JR.; SERGE BONANNI; LORRAINE HIBBS; ALBERT C. JASLOW, M.D.; ROBERT J. VAN DE WETERING, M.D.; WALTER L. COOPER; JAMES D. O'DONNELL,

Petitioners,

v.

LAWRENCE J. LEWIS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Eleventh Circuit deny the parties procedural due process when it denied the parties' right to brief the issue of the appropriateness of the order awarding minimal sanctions?

II. Did the United States Court of Appeals for the Eleventh Circuit err in its application of the standard of review of the order awarding minimal sanctions?

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The judgment of the Court of Appeals for the Eleventh Circuit was entered on July 30, 1990. (Appendix A, App. 1.)

JURISDICTION

This petition for a writ of certiorari was filed within 90 days of the July 30, 1990 judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. *See also Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989 (5th Cir. 1986) (holding that request for fees under either Fed. R. App. P. 11 or 28 U.S.C. § 1927 requires the district court to make a determination which is collateral to the merits of a claim.)

STATEMENT OF THE CASE

In May 1983, twelve member/directors of Anclote Psychiatric Center, Inc. (APC), a not-for-profit corporation, organized Anclote Manor Hospital, Inc. (AMH), a for-profit corporation. AMH then purchased substantially all of APC's assets for $6.3 million. AMH resold those assets in October 1985, two and one half years later, for approximately $29 million.

In May 1986, Lawrence J. Lewis, M.D., a former APC employee, filed a complaint in the United States District Court for the Middle District of Florida against AMH, its

twelve shareholder/directors, and the directors' attorney (collectively, Anclote), alleging that the price paid by AMH was below the fair market value for the property and that Anclote was guilty of violating RICO, 18 U.S.C. § 1964(c), having effected the 1983 sale by virtue of a "breach of fiduciary duty."

Pursuant to their own Rule 11 obligations, Anclote's counsel pointed out, in at least two letters to Lewis' counsel, that Lewis had no standing to sue, and that he had no basis for his federal "racketeering" allegations against Anclote, which were the sole basis for federal jurisdiction in this otherwise nondiversity matter. Lewis, however, failed to respond and persisted in his efforts to prosecute. Anclote's motion to dismiss was denied and discovery ensued. Further, Lewis and his counsel fomented a series of newspaper articles regarding the AMH transactions, which resulted in adverse publicity, and caused incalculable damage to the Anclote defendants.

Not surprisingly, the Honorable George C. Carr granted Anclote's motion for summary judgment in July 1987, based upon Lewis' lack of standing, among other reasons. Lewis' appeal failed, as did his petition for a writ of certiorari. Anclote moved for sanctions on February 2, 1988.[1]

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[1] At that time, actual damages caused to the Anclote defendants by Lewis, including the cost of defending the suit (but omitting the attorneys' fees later incurred to prosecute the Rule 11 appeal), exceeded $300,000.

The Honorable William J. Castagna denied the motion on April 7, 1989,[2] without conducting a hearing or inquiring further into its justification. Anclote appealed to the Eleventh Circuit.

On February 8, 1990, the court found that "the cursory nature of the district court's order [made] it impossible . . . to engage in meaningful appellate review," vacated the decision, and remanded "for the limited purpose of allowing [the] court to clarify its reasons for refusing to impose Rule 11 sanctions."[3] On April 9, 1990, Judge Castagna vacated his previous order and recused himself, having entered the order appealed "inadvertently." The case was then transferred to the Honorable William Terrell Hodges.[4]

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[2] Judge Carr had become very ill in the interim.

[3] On February 19, 1990, Anclote filed a petition for rehearing of the order remanding the case, in part because Judge Carr, who had heard the underlying suit, had since died. Anclote sought clarification of the mechanics required to comply with the order, especially "whether an opportunity [would] be available for subsequent briefing to [the appellate court] following the anticipated order denying sanctions" by the district court. The petition was denied on April 16, 1990.

[4] Following the district court's action, on April 18, 1990, Anclote again sought direction from the appellate court, asking for clarification of both that court's order vacating the order appealed, and also instructions as to the appropriate procedure to follow, in light of the district court's order vacating the order appealed (which Anclote suggested the lower court had no jurisdiction to do). Anclote noted then that the order appealed from no longer existed. Nevertheless, on May 22, 1990, that motion was denied.

On April 23, 1990, Judge Hodges referred this matter to the U. S. Magistrate, directing her to give "fresh consideration" to the issues. Following an evidentiary hearing, Magistrate Jenkins filed her report and recommendation. Judge Hodges adopted her report in its entirety and ordered sanctions in the amount of $4,420. His order, her report, the hearing transcript, and the parties' objections were then forwarded to the appellate court.

On July 30, 1990, the Eleventh Circuit entered its judgment, noting that Judge Castagna's order denying sanctions, from which the appeal had been taken, had been vacated, and that Judge Hodges had entered an order granting sanctions. Conceding that, by doing so, it would circumvent the parties' right to brief the issues, the court nonetheless affirmed Judge Hodges' order:

> Mindful of the fact that the parties to this appeal have not had an opportunity to brief this court following the district court's order on limited remand, we have carefully reviewed both parties' objections to the report and recommendation of the magistrate. We find those objections to be without merit.
>
> . . . .
>
> For the foregoing reasons, the district court's order imposing sanctions against J. Miles Buchman [Lewis' counsel] in the amount of $4,420.00 . . . [is] AFFIRMED.

This judgment was followed on August 23, 1990 by a mandate issued by the Eleventh Circuit, which erroneously stated:

> ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that

> the order of the District Court appealed from, in this cause be and the same is hereby AFFIRMED;
>
> IT IS FURTHER ORDERED THAT defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of the Court.

The order appealed had been vacated by both the appellate court and the lower court. The order affirmed was Judge Hodges' order awarding sanctions, which was not on appeal.[5]

REASONS FOR GRANTING WRIT

I. BY DENYING THE PARTIES' RIGHT TO BRIEF THE ISSUE OF THE PROPRIETY OF THE ORDER GRANTING SANCTIONS, THE APPELLATE COURT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND, FURTHER, SANCTIONED A SIMILAR DEPARTURE BY THE DISTRICT COURT, AS TO REQUIRE THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

No Federal Rule of Appellate Procedure addresses these procedural circumstances. However, Rule 4(a)(4) confronts a similar situation, the peculiar predicament that develops when a timely notice of appeal is followed by a timely motion:

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[5] That order is the subject of another appeal filed, in an abundance of caution, by Anclote, pursuant to Fed. R. App. P. 4, Case No. 90-3550 in the Eleventh Circuit Court of Appeals. Lewis moved to dismiss on the theory that Anclote is limited to its original appeal of Judge Castagna's order.

> (i) for judgment under Rule 50(b); (ii) under Rule 52(a) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

Rule 4 further provides that a notice of appeal filed before the disposition of such a motion is of "no effect," obviously because the original order has been replaced by the order on the subsequent motion. Consequently:

> A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion. . . .

The new notice is mandatory.

The analogy to the instant procedural scenario cannot be disputed; the sole distinction is that the request for findings was made, not on motion of a party, but upon limited remand by the appellate court, after it had vacated the order appealed.

Rule 2 confers broad equitable discretion upon the court of appeals to suspend the requirements of any rule (except 26(b)) for good cause shown. That there is no rule overtly applicable to these circumstances and that such a decision would have caused no prejudice to Lewis is good cause alone to suspend that part of Rule 4 which distinguishes its application here.

Moreover, the spirit of Rule 4 should govern in any case, especially in light of the vacating of the order appealed by both trial and appellate courts. Accordingly,

because Anclote should have been entitled to appeal the order awarding minimal sanctions in a Rule 4 situation, and, therefore, to brief its position that the sanctions eventually awarded were inappropriate and insufficient, Anclote should have been afforded that due process opportunity here, as well.

The Eleventh Circuit judgment in this case raises important policy and procedural considerations. First, the appellate court remanded the matter to the trial court for the limited purpose of obtaining findings of fact to support the order appealed. But the court below vacated that order, and entered a wholly new order. This breach of proper procedure was ignored by the Eleventh Circuit and was, in effect, sanctioned by that court.

Second, the court limited its consideration of the parties' arguments regarding the propriety of the new order to the initial briefs, which addressed only the original denial of sanctions, and to the objections filed below, a plainly inequitable outcome. (If the resolution of this issue were that simple, it would follow that no briefs are needed on any appeal.)

Like the situation initially presented to this Court in *Rice v. Sioux City Memorial Park*, 349 U.S. 70 (1955), "despite the rather unique circumstances of this case," the Eleventh Circuit's willingness to deprive the parties of procedural due process renders this issue "special and important" enough to merit the consideration of the Court. (And, unlike *Rice*, in which the Court ultimately dismissed certiorari as improvidently granted, no remedy has been effectuated by the legislature.) This is especially

true in a situation involving a request for Rule 11 sanctions, in which the Court should intervene to communicate to both litigants and the courts that: 1) the issue of Rule 11 sanctions is not to be treated casually or in the cursory manner seemingly espoused by the Eleventh Circuit here; and 2) the arguments of the parties involved in the underlying action are entitled to due consideration and procedural due process by the appellate tribunal.

II. BECAUSE THE APPELLATE COURT DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS WHEN IT DENIED THE PARTIES' RIGHT TO BRIEF THE ISSUE OF THE PROPRIETY OF THE ORDER GRANTING SANCTIONS, THE COURT FURTHER ERRED IN ITS APPLICATION OF THE STANDARD OF REVIEW OF THE ORDER AWARDING MINIMAL SANCTIONS.

The Eleventh Circuit limited the parties' arguments before it (and thereby its review of the order awarding minimal sanctions), to the initial briefs, which addressed only a denial of sanctions, and the objections filed below.

Moreover, on its own, the court purported to employ the newly enunciated standard of review of Rule 11 sanction orders, that of abuse of discretion, announced by this Court after the lower court had entered its order awarding sanctions. *Cooter & Gell v. Hartmax Corp.*, ___ U.S. ___, 110 S.Ct. 2447 (1990). But the court denied Anclote the opportunity to address the application of that standard to the circumstances at hand, despite the fact that, prior to *Cooter*, it had previously relied upon *Westmoreland v. CBS*, 770 F.2d 1168 (D.C. Cir. 1985), for the proposition that a *de novo* standard should be applied to the trial court's legal

rulings with respect to a motion for sanctions. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1986) (en banc). And Anclote had argued that the more easily satisfied *de novo* criterion required the reversal of the court below.

Thus, as a result of the appellate court's departure from accepted judicial procedure and its consequent denial of Anclote's due process right to brief the issues, the court was unaware that the application of the more stringent abuse of discretion standard nevertheless mandated reversal of the trial court's holdings with respect to the variety of Lewis' Rule 11 violations, as well as reversal of the amount of the sanction awarded for being "inappropriate" under Rule 11. Anclote was prohibited from demonstrating to the appellate court that the trial court had abused its discretion, relying on a "materially incorrect view of the relevant law" (the *Cooter* standard) in reaching its conclusions that:

1. Lewis' counsel had fulfilled his legal pre-filing duties;

2. neither Lewis nor his counsel had engaged in conduct that was unreasonable or vexatious;

3. there was no violation of the improper purpose element of Rule 11; and

4. sanctions should not have been imposed against Lewis himself. (His counsel alone was penalized).

Anclote was further prevented from showing the court that all of the foregoing had impacted to drastically lower

the trial court's assessment of what amount constituted a reasonable sanction.[6]

Furthermore, because the issue of the amount of sanctions was not addressed at all in the initial briefs, much less the standard to be applied to a review of an award, Anclote was prevented from demonstrating to the appellate court that the trial court had relied upon a clearly erroneous view of the law in setting the penalty at so low a figure as $4,420.

The far reaching significance of the Eleventh Circuit's denial of Anclote's due process right to brief the issues raised on appeal should not be ignored. Further, the need for the Court to address the issue of the amount of "appropriate" Rule 11 sanctions has been clarified by the perfunctory review afforded by the court of appeals. The ramifications of the judgment entered here "imply a reach to a problem beyond the academic or the episodic" (*Rice*, 349 U.S. 74) and "involve principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

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[6] The magistrate had premised her recommendations regarding the amount of sanctions on her holding that Lewis' lawyer had violated Rule 11 only by failing to satisfy his factual prefiling obligations.

CONCLUSION

The Eleventh Circuit's judgment denying the parties' right to brief their objections to the order granting sanctions, so far departed from the accepted and usual course of judicial proceedings, and, further, its sanction of a similar departure by the district court, requires the exercise of the Supreme Court's power of supervision.

For the foregoing reasons, Petitioners respectfully petition the Supreme Court to grant a writ of certiorari to review the judgment and opinion of the Eleventh Circuit.

DATED: October 29, 1990

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3382
Non-Argument Calendar

D.C. Docket No. 86-00654-Civ-T-13C

LAWRENCE J. LEWIS, M.D., a contributor
to Anclote Psychiatric Center, Inc.,
a Florida Not For Profit Corporation,

Plaintiff-Appellee,

versus

ANCLOTE MANOR HOSPITAL, INC.,
a Florida For Profit Corporation,
WALER H. WELLBORN, JR., M.D.,
ARTHUR R. LAUTZ, MANUEL VALLES, JR.,
ROBERT L. CROMWELL, THOMAS C.
FARRINGTON, JR., THOMAS E. MCLEAN,
JAMES C. TREZEVANT, JR., SERGE BONANNI,
LORRAINE HIBBS, ALBERT C. JASLOW, M.D.,
ROBERT J. VAN de WETERING, M.D.,
WALTER L. COOPER, JAMES P. O'DONNELL,

Defendants-Appellants,

ROBERT A. BUTTERWORTH,
Attorney General of the
State of Florida,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida.

(July 30, 1990)

Before FAY, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

In May of 1989, the defendants appealed the district court's order of April 7, 1989 denying their motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure and their motion to tax costs against the plaintiff.

On February 8, 1990 we issued an opinion remanding this case to the district court for the limited purpose of allowing that court to clarify its reasons for refusing to impose Rule 11 sanctions against the plaintiff. We reserved ruling on the defendants' appeal of the district court's refusal to tax costs. This case is before us following the district court's disposition on limited remand.

On remand, the district court vacated its initial order and referred the case to a United States Magistrate for a report and recommendation as to appropriate disposition of the matter. The district court, adopting and confirming the report of the magistrate, ordered that sanctions be imposed against J. Miles Buchman, counsel for plaintiff, in the amount of $4,420.00.

Under the recent Supreme Court case of *Cooter & Gell v. Hartmarx Corp.*, No. 89-275, 58 U.S.L.W. 4763 (June 11, 1990), the appellate court is to apply an abuse of discretion standard in reviewing all aspects of the district court's Rule 11 determination. We have reviewed the district court's order incorporating the report and recommendation of the magistrate and conclude that the district court did not abuse it discretion in awarding sanctions in the amount of $4,420.00.

Mindful of the fact that the parties to this appeal have not had an opportunity to brief this court following the district court's order on limited remand, we have carefully reviewed both parties' objections to the report and recommendation of the magistrate. We find those objections to be without merit.

We have also reviewed the district court's separate order denying the plaintiff's motion to quash the Clerk's taxing of costs and ordering that costs be taxed against the plaintiff in the amount of $5,816.40. We hold that the court did not abuse its discretion in allowing costs to the prevailing party pursuant to Fed. R. Civ. P. 54(d).

For the foregoing reasons, the district court's order imposing sanctions against J. Miles Buchman in the amount of $4,420.00 and its order denying the plaintiff's motion to quash the Clerk's taxing of costs are AFFIRMED.